STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 18-98:

FRENCHTOWN PUBLIC SCHOOLS, DISTRICT NO. 40, Complainant,	)	
vs.	)	FINAL ORDER
FRENCHTOWN EDUCATION ASSOCIATION, MEA/NEA Respondent.	)	

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The above-captioned matter came before the Board of Personnel Appeals on October 22, 1998. Complainant appealed from the March 17, 1998, Investigation Report and Notice of Intent to Dismiss. Appearing before the Board were Karl Englund, attorney for Respondent, appearing in person, and Don K. Klepper, representing the Complainant, participating by telephone.

The initial issue considered by the Board was whether the present matter was timely appealed. The Board concluded unanimously that it was timely filed.

After review of the record and consideration of the arguments by the parties, the Board concludes that the record supports the decision of the investigator. The substance of the present matter is an unfair labor practice charge (18-98) being filed in response to an unfair labor practice charge (17-98) being filed previously by the respondent. The Board concludes that the present matter is not, as a matter of law, an unfair labor practice as defined in 39-31-402, MCA, and the investigator was correct in his conclusion to issue a notice of intent to dismiss. Accordingly, the Board orders as follows:

1. **IT IS HEREBY ORDERED** that the Board upholds the Investigation Report and Notice of Intent to Dismiss issued by investigator.

2. **IT IS FURTHER ORDERED** that the appeal to the Investigation Report and Notice of Intent to Dismiss is dismissed.

DATED this 29 day of December, 1998.

BOARD OF PERSONNEL APPEALS

By: James A. Rice, Jr.
James A. Rice, Jr.
Presiding Officer

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Board members Rice, Schneider and Perkins concur.
Board members Talcott and Hagan dissent.

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FRENCHTOWN PUBLIC SCHOOLS DISTRICT NO. 40, FRENCHTOWN, MT Complainant, -vs- FRENCHTOWN EDUCATION ASSOCIATION, MEA/NEA Defendant.	)	INVESTIGATION REPORT AND NOTICE OF INTENT TO DISMISS

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I. INTRODUCTION

On November 10, 1997, the Frenchtown Public School, District No. 40, Frenchtown, Montana filed an unfair labor practice charge with this Board alleging that the Frenchtown Education Association was violating Section 39-31-402 (2) MCA. The Defendant denied any violation of the above cited law.

II. ISSUES

An investigation was conducted which included contact with the parties involved. The Complainant alleges that: "The Defendant has committed an Unfair Labor Practice and violated 39-31-401 (2) MCA by engaging in bad faith bargaining by attempting to grieve language that is not present in the master contract, by seeking remedy under the guise of past practice when the contract is zipped, and by attempting to incorrectly advance this dispute

through election of remedy language.

The Defendant argues that the instant charge "appears to be filed in retaliation for and in response to ULP No. 17-98, in which the (Defendant) alleged that the School District made a unilateral change in a mandatory subject of bargaining, ..." "... (E)ven assuming for the sake of argument that the grievance and the unfair labor practice charge lack merit, that does not constitute a violation of the Act and the Association's duty to bargain in good faith.

III. DISCUSSION

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using Federal Court and National Labor Relations Board (NLRB) precedents as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act as the state act is so similar to the Federal Labor Management Relations Act, State ex rel. Board of Personnel Appeals vs. District Court., 183 Montana 223, 598 P.2d 1117, 103 LRRM 2297; Teamster Local No. 45 v. State ex rel. Board of Personnel Appeals, 1985 Montana 272, 635 P.2d 1310, 110 LRRM 2012; City of Great Falls v. Young (III), 683 P.2d 185, 119 LRRM 2682, 21 Montana 13.

Good faith bargaining is defined in Section 39-31-305 MCA as the performance of the mutual obligation of the public employer or his designated representative and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder in the execution of a written contract incorporating any agreement reached. Such obligation

does not compel either party to agree to a proposal or require the making of a concession. See NLRB v. American National Insurance Company, 30 LRRM 2147, 343 US 395, 1952; NLRB v. Bancroft Manufacturing Company, Inc., 106 LRRM 2603, 365 F.2d 492, 1981 CA 5; NLRB v. Blevins Popcorn Company, 107 LRRM 3108, 659 F.2d 1173, 1981 CA DC; Struthers Wells Corporation v. NLRB, 114 LRRM 3553, 721 F.2d 465, 1980 CA 3.

The basis for this charge appears to center on whether or not the "zipper clause", Article XIII, Section 13.4, "Scope of Agreement" of the Collective Bargaining Agreement (CBA) between the parties waives the duty to bargain on the part of the Complainant. The Complainant argues that the Defendant should comply with the CBA "that was bargained in good faith and is in full force and effect."

According to *The Developing Labor Law, Third Edition*, Patrick Hardin, Editor in Chief, BNA Publications, Washington, D.C., 1992: "...(U)nless discharged or waived, the duty to bargain continues during the term of the collective bargaining agreement. Frequently, the waiver issue arises in connection with unilateral employer action... . (pp. 699-700).

In determining whether a contractual waiver exists, the Board considers the bargaining history of the contract language and the parties' interpretation of the language. Where an employer relies on contract language as a purported waiver to establish unilaterally its right to change terms and conditions of employment not contained in the contract, the Board requires evidence that the matter in issue was "fully discussed and consciously explored during negotiations and the union must have consciously yielded or

clearly and unmistakably waived its interest in the matter." (p. 701)

The Complainant's arguments for waiver of bargaining rights and the proper contractual interpretation(s) in the instant case are more properly raised as defenses against the charges raised by the Defendant in ULP #17-98. The Complainant argues a violation of the Act because the Defendant filed grievances citing past practice under the CBA and then filed an unfair labor practice charge under the "election of remedies" clause of the CBA. The filing of grievances or unfair labor practices by an exclusive representative for public employees falls clearly within the right of self-organization as enumerated in 39-31-201, MCA. This charge does not rise to a level of a case and controversy sufficient to warrant an evidentiary hearing. The details of the charge, however, are directly related to ULP #17-98 and a copy of this Investigation Report, the charge filed on November 10, 1997 and the Response dated December 5, 1997 are hereby added to that record in order to provide additional information.

IV. DETERMINATION

Based on the foregoing, the record does not support a finding of probable merit to the charge and this matter must be dismissed.

DATED this 17th day of March, 1998.

BOARD OF PERSONNEL APPEALS

By: _____
Paul Melvin
Investigator